80-1291

No. _____

Supreme Court, U.S.
FILED
DEC 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HADWEN, INC.,
Appellant,
v.
VERMONT DEPARTMENT OF TAXES
Appellee,

ON APPEAL FROM THE VERMONT SUPREME COURT

JURISDICTIONAL STATEMENT

EUGENE V. CLARK, ESQ.,
CLARK, LILLIE & HOLDEN,
204 Union Street,
Bennington, Vermont 05201,
802-447-1151,
Attorney for Appelant.

Hadwen, Inc., Bennington, Vermont

QUESTION PRESENTED

Did the Court below properly hold that the Equal Protection Clause of the Fourteenth Amendment to the United State Constitution was not violated by a statutory classification established under 32 Vermont Statutes Annotated §9741 (14) and (15) pursuant to which publishers of newspapers which are *sold* to the public pay no sales or use tax on materials used in the publication process whereas publishers of newspapers which are distributed without charge to the public must pay the tax on the same materials?

TABLE OF CONTENTS

	Page
Opinion Below	2
Grounds of Jurisdiction of Supreme Court	2
Question Presented	i, 3
Statement of the Case	3
Substantiality of Federal Question	6
Conclusion	10
Appendices:	
Exhibit A—Opinion of Vermont Supreme Court	1a
Exhibit B—Order of Vermont Supreme Court Denying Motion for Reargument	9a
Exhibit C—Findings, Conclusions and Order of Bennington Superior Court	10a
Exhibit D—Decision of Commissioner of Taxes	19a
Exhibit E—Notice of Appeal to Supreme Court of the United States	26a

TABLE OF AUTHORITIES

CASES

Hartford Steam Boiler Inspection and Insurance Company v. Harrison, 301 U.S. 458 (1937)	2, 9
International Business Machines Corp. v. Department of Taxes, 133 Vt. 269, 336 A.2d 158 (1974)	7
McClure Newspapers, Inc. v. Department of Taxes, 132 Vt. 169, 320 A.2d 621 (1974)	9
Quilloin v. Walcott, 434 U.S. 246 (1978)	2, 9
Stanton v. Stanton, 421 U.S. 7 (1975)	2, 9
Walters v. City of St. Louis, 347 U.S. 231 (1954)	2, 9

PREVIOUS PAGE WAS BLANK

Page

Statutes

Constitution of the United States, Fourteenth Amendment 3, 5

28 U.S.C. §1257 (2) 2, 8

32 Vermont Statutes Annotated
§9741 (14) and (15) 2, 4, 6, 7, 8

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HADWEN, INC.
Appellant,
v.

VERMONT DEPARTMENT OF TAXES
Appellee,

ON APPEAL FROM THE VERMONT SUPREME COURT

JURISDICTIONAL STATEMENT

NOW COMES HADWEN, INC., Appellant herein, by and through its attorneys, Clark, Lillie & Holden, to make the following jurisdictional statement pursuant to Rule 15 of the Rules of the United States Supreme Court:

OPINION BELOW

To date there are no official or unofficial reports of the opinions delivered by the Courts below in the within cause. The decision of the Vermont Supreme Court, from which this appeal is taken, will be reported in the Vermont Reports and the Atlantic Reports. A copy of the opinion is included herein as Exhibit A.

GROUNDS OF JURISDICTION OF THE SUPREME COURT

This proceeding is an appeal taken from a decision of the Vermont Supreme Court and is taken pursuant to 28 U.S.C. §1257 (2). The decision and order of the Vermont Supreme Court was entered September 9, 1980. The motion of Hadwen, Inc. for reargument was denied by Order of the Vermont Supreme Court dated September 30, 1980. The Notice of Appeal was filed in the Vermont Supreme Court on December 29, 1980. The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. §1257 (2). It is believed that the following cases sustain the jurisdiction of this Court over the within cause:

Quilloin v. Walcott, 434 U.S. 246 (1978)
Stanton v. Stanton, 421 U.S. 7 (1975)
Walters v. City of St. Louis, 347 U.S. 231 (1954)
Hartford Steam Boiler Inspection and Insurance Company v. Harrison, 301 U.S. 458 (1937)

This appeal draws into question the validity of 32 Vermont Statutes Annotated (VSA) §9741 (14) and (15) under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. 32 VSA §9741 (15) has since been amended, but the statutes which were in effect at all times pertinent to this appeal read as follows:

32 VSA §9741:

"Receipts from the following shall be exempt from the tax on

retail sales imposed under Section 9771 of this Title and the Use Tax imposed under Section 9733 of this Title."

"(14) Tangible personal property which becomes an ingredient or component part of, or is consumed or destroyed or loses its identity in the manufacture of tangible personal property for sale but does not include fuel and electricity; machinery and equipment for use or consumption directly and exclusively, except for isolated or occasional uses, in the manufacture of tangible personal property for sale...For the purposes of this Subsection 'manufacture' includes extraction of mineral deposits, the entire printing and bookmaking process, and the entire publication process."

"(15) Sales of newspapers."

Subsection (15) above has subsequently been amended. The statute is found at pages 252-253 of Title 32, Volume 8A of the Vermont Statutes Annotated.

QUESTION PRESENTED

Did the Court below properly hold that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was not violated by a statutory classification established under 32 Vermont Statutes Annotated §9741 (14) and (15) pursuant to which publishers of newspapers which are *sold* to the public pay no sales or use tax on materials used in the publication process whereas publishers of newspapers which are distributed *without charge* to the public must pay the tax on the same materials?

STATEMENT OF THE CASE

Hadwen, Inc., Appellant herein, prints a weekly publication called the "Pennysaver," which has a circulation of approximately 34,000 recipients in southern Vermont and adjacent areas of New

York and Massachusetts. With the exception of approximately 150 sold subscriptions, the publication is distributed without charge to the public.

The Vermont Department of Taxes assessed a 3% use tax on ink, newsprint, and supplies used by Hadwen, Inc. in Vermont in the printing of the "Pennysaver" from August 1972 through December 1974. Hadwen, Inc. appealed this assessment to the Commissioner of Taxes on grounds that it was statutorily exempt from the assessment and that imposition of the assessment against it would result in a violation of the Equal Protection and Free Press clauses of the United States Constitution. The Deputy Commissioner of Taxes rejected these arguments, upheld the assessment, and concluded that the "Pennysaver" was not a newspaper within the meaning of 32 VSA §9741 (15). [Exhibit D.]

Hadwen, Inc. appealed the determination of the Deputy Commissioner to Bennington Superior Court. The Court reversed the determination, concluding that the "Pennysaver" was a newspaper within the meaning of 32 VSA §9741 (15), and that imposition of the subject tax against Hadwen, Inc. constituted a violation of the Equal Protection Clause of the United States Constitution. [Exhibit C.]

The Vermont Supreme Court reversed, holding that while the "Pennysaver" was a "newspaper" within the meaning of 32 VSA §9741 (15), imposition of the subject tax did not result in a violation of the Equal Protection Clause of the United States Constitution.

The federal question sought to be reviewed was first raised in the evidentiary hearing before the Commissioner of Taxes held on June 23, 1976 wherein counsel for Hadwen, Inc. stated to the Commissioner as follows:

> "We don't feel that a classification can be constitutionally established which treats taxpayers in a like circumstance in a different manner...to the detriment of one within that class as

> opposed to another,...and do not feel...that statutes can properly be construed to extend to either unreasonable or unconstitutional limits of (classification). That rather they should be construed narrowly to avoid the pitfalls of unconstitutionality and unreasonableness. I have in mind that both the Burlington Free Press and the Pennysaver...one being a daily newspaper and the other being the Pennysaver, derive the bulk of their income from sales advertising. In one instance, we have no tax imposed on the Burlington Free Press and their sale of advertising, therefore, is free of the burden of tax. And in the case of the Pennysaver, if the tax is ultimately imposed, it would impose an unfair burden on a publication which we feel should be treated in the same light as the Burlington Free Press."

The Equal Protection issue was next raised in the Memorandum of Law submitted by Hadwen, Inc. to the Commissioner of Taxes in connection with the appeal to the Commissioner. The issue was raised at page 4 of the aforementioned Memorandum in the following manner:

> "Moreover, any attempt to draw a taxability distinction between newspapers which are sold and those which are distributed freely would not only run counter to the statutory scheme outlined above, but would also result in an invidious and unconstitutional discrimination against the newspaper which distributes freely."

The issue was next raised in the appeal to the Bennington Superior Court in the Memorandum of Law submitted by Hadwen, Inc. Specifically, at page 10 or 11 thereof, Hadwen, Inc. argued that:

> "Imposition of the sales and use tax in the subject proceeding would violate the Free Press and Equal Protection Clauses of the United States Constitution....Imposition of the subject tax on the *Pennysaver* and not the others constitute a clear and invidious discrimination and imposes an unfair financial

burden on Appellant herein...No rational basis exists, nor is any valid legislative purpose served by such an arbitrary classification."

Finally, the Equal Protection issue was raised in the Brief of Hadwen, Inc., then Appellee, in the appeal to the Vermont Supreme Court. Specifically, at page 13 thereof, Hadwen, Inc. argued as follows:

"The crucial inquiry, from an Equal Protection standard is: Given the fact that purchasers of newspapers are exempt from sales and use tax under 32 VSA §9741 (15), does a rational basis exist for taxing publishers on supplies used in the printing of a newspaper for ultimate free distribution when no such tax is imposed on the publisher for supplies used in the printing of a newspaper for ultimate sale to the public? The Court below quite properly answer this question in the negative and found a violation of Equal Protection in the imposition of the subject tax against Appellee herein."

SUBSTANTIALITY OF FEDERAL QUESTION

This appeal presents an important and substantial federal question. It challenges the constitutionality of Title 32 Vermont Statutes Annotated §9741 (14) and (15) which, simply stated, operate to the following end: Publishers of newspapers which are sold pay no sales tax or use tax in Vermont on supplies used in the publication of their newspaper. On the other hand, publishers of newspapers which are distributed to the public without charge, such as Appellant herein, must pay a tax on the very same supplies.

Both 32 VSA §9741 (14) and (15) provide statutory exemptions from the Vermont sales and use tax set forth in Chapter 233 of the Vermont Statutes Annotated. 32 VSA §9741 (14) and (15) provided, at all times pertinent to this appeal, as follows:

"Receipts from the following shall be exempt from. . . . the use

tax imposed under §9773 of this Title:

> (14) Tangible personal property which becomes an ingredient or component part of or is consumed or destroyed or loses its identity in the manufacture of tangible personal property *for sale* but does not include fuel and electricity; machinery and equipment for use or consumption directly and exclusively in the manufacture of tangible personal property for sale. For the purposes of this subsection, 'manufacture' includes extraction of mineral deposits, the entire printing and bookmaking process and the entire publication process." (Emphasis added)
>
> (15) Sales of newspapers.

The purpose of subsection (14), the so-called "manufacturer's exemption," is to fix the point of excise on the last retail transaction (the sale of the finished product) by exemption of prior transactions. This avoids the multiple taxation which would occur if a tax were imposed on both the raw material at the time of purchase and the finished product. Subsection (14) exempts that which will later be taxed, in its final form, to the ultimate consumer. *International Business Machines Corp. v. Department of Taxes,* 133 Vt. 269, 276 (1974).

But 32 VSA §9741 (15), which exempts "sales of newspapers" from the "ultimate" tax, clearly singles out the newspaper industry for special exempt status. Not only is the sale of publishing materials exempt under 32 VSA §9741 (14), but so is the sale of the finished product to the ultimate consumer. In other words, with respect to newspapers that are *sold* absolutely *no* sales or use tax is ever exacted at *any* point. In short, the sale - no sale classification of Subsection (14) loses its nexus with respect to newspapers because 32 VSA §9741 (14) and (15), read together, exempt both the supplies *and* the final product (the newspaper) from *any* tax.

In upholding the imposition of the subject tax against the Appellant herein, the Court below premised its decision on the fact

that Appellant's publication, the "Pennysaver" was not "sold" under 32 VSA §9741 (14). Appellant herein argued that imposition of the tax against it was discriminatory and in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because publishers of newspapers which were sold paid no such tax. It further maintained that any rational basis for discriminating against it as a free newspaper based upon the sale - no sale distinction of Subsection (14) evaporated in light of the 32 VSA §9741 (15) exemption for sales of newspapers.

The Court below responded to the Equal Protection issue by attempting to articulate a "rational basis" for the mere statutory presence of the subsection (15) exemption for sales of newspapers: "In keeping with its policy of exempting small sales (i.e. under 14¢, 32 VSA §9772), the Legislature could well have considered the large percentage of retail newspaper sales made not only for small sums, but by minors, actually as 'independent merchants.' " [Exhibit A.]

Such an analysis is non-responsive to the discriminatory classification at issue. It purports to answer only the question of why sales of newspapers are exempt. It does not address the crucial issue of why publishers of sold newspapers should be exempt from the materials used in publication while publishers of newspapers distributed without charge must pay the tax.

This appeal is before this Court under 28 U.S.C. §1257 (2). That statute confers the right of appeal in cases where is drawn in question "the validity of a statute of any State on the grounds of its being repugnant . . . to the Constitution of the United States, and the decision is in favor of its validity." The statute in this proceeding was attacked by Appellant herein throughout the proceedings below as being repugnant to the Equal Protection Clause of the Fourteenth Amendment. The Vermont Supreme Court in its decision below rejected this contention and upheld the validity of the statute. In this posture, the case is in line with other appeals to this Court from decisions of highest State courts which have upheld

the validity of State statutes against equal protection claims. *Quilloin v. Walcott,* 434 U.S. 246 (1978) (Georgia); *Stanton v. Stanton,* 421 U.S. 7 (1975) (Utah); *Hartford Steam Boiler Inspection and Insurance Company v. Harrison,* 301 U.S. 458 (1937) (Georgia).

The federal question presented is substantial and requires plenary consideration, with briefs on the merits and oral arguments, because it challenges the validity of a state statute which on its face creates a discriminatory classification. It therefore calls into consideration the fundamental right to equal protection under the law conferred by the Fourteenth Amendment of the United States Constitution.

The power of the State to classify for purposes of taxation, while wide in range and flexibility, is subject to the qualification that such classifications must be reasonable and must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. *Hartford Steam Boiler Inspection and Insurance Co. v. Harrison,* 301 U.S. 458, 462 (1937); *Walters v. City of St. Louis,* 347 U.S. 231, 236 (1954). It is the contention of Appellant that 32 VSA §9741 (14) and (15) evidence a clear statutory purpose to confer a special tax exempt benefit on the newspaper industry. This position is supported by a prior decision of the Vermont Supreme Court, *McClure Newspapers, Inc. v. Department of Taxes,* 132 Vt. 169 (1974). In addressing the issue of whether certain items of personal property used in the newspaper publication process were deemed to fall within the manufacturing exemption of 32 VSA §9741 (14), the Court held:

> "Any tax imposed on expendable materials employed prior to the actual rolling of the presses would result in a cost to the publisher that would be passed on to the consumer. Receipts from the sale of the newspaper, the final product, are exempt under 32 VSA §9741 (15). The presence of this subsequent subsection does not conclusively show that the Legislature intended that no cost of taxation should be imposed on the

> newspaper business and passed along to the public, but we do feel that it manifests *some legislative intent that would be defeated* if 32 VSA §9741 (14) were to be narrowly construed in this instance." *Id. at 175.* (Emphasis added.)

The very purpose articulated above of conferring a special benefit on the newspaper industry is completely frustrated by the opinion of the Court below in the within cause. Rather than promoting the statutory purpose of encouraging dissemination of news to the public, it has the opposite effect. In the process it upholds a discriminatory statutory classification which results in a clear violation of appellant's fundamental right to equal protection. It raises a substantial federal question requiring this Court's plenary consideration.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the Court a substantial and important federal question which requires plenary consideration, with briefs on the merits and oral argument, for its resolution.

Respectfully submitted,

Eugene V. Clark, Counsel of record
Attorney for Appellant
Clark, Lillie & Holden
204 Union Street
Bennington, Vermont 05201
Area Code 802-447-1151

Exhibit A

ENTRY ORDER

SUPREME COURT DOCKET NO. 172-79

JUNE TERM, 1980

Hadwen, Inc.

v.

Vermont Department of Taxes

APPEALED FROM:

Bennington Superior Court

DOCKET NO. S15 -76Bm

In the above entitled cause the Clerk will enter:

The judgment of the Bennington Superior Court is vacated. The September 20, 1976 assessment of the Commissioner of Taxes is reinstated, and the caused certified to the Bennington Superior Court and to the Commissioner of Taxes.

FOR THE COURT:

Franklin S. Billings, Jr., Associate Justice

Dissenting:

Concurring:

Albert W. Barney, Chief Justice

Rudolph J. Daley, Associate Justice

Robert W. Larrow, Associate Justice

William C. Hill, Associate Justice

NO. 172-79

Hadwen, Inc.

v.

Vermont Department of Taxes

Supreme Court

On Appeal from
Bennington Superior Court

JUNE TERM, 1980

PRESENT: Barney, C.J., Daley, Larrow, Billings and Hill, JJ.

BILLINGS, J. This case arises from an order of the Bennington Superior Court reversing on appeal a determination by the commissioner of taxes that the plaintiff, Hadwen, Inc., owes use taxes, 32 V.S.A. §9773, from August, 1972, through December, 1974, on the ink, newsprint and other supplies used by the plaintiff in the publication of the "Pennysaver." The Department of Taxes, appelant here, has sought collection of the tax on the premise that the ingredients of the "Pennysaver" are not exempt from tax under 32 V.S.A. §9741 (14) because the "Pennysaver" is not sold. The plaintiff, Hadwen, Inc. has contended that it is exempt from taxation under 32 V.S.A. §9741 (14) and (15), and either by operation of the equal protection clause of the Fourteenth Amendment or under the First Amendment of the United States Constitution.

The facts are not in issue here, but the classification of the "Pennysaver" as a newspaper is relevant to this Court's review of the plaintiff's argument since plaintiff's equal protection argument applies only if the "Pennysaver" is found to be a newspaper, while the First Amendment issue hinges upon a determination that the publication is not a newspaper.

It is apparent from the record that the "Pennysaver" is a weekly publication with a circulation of roughly 34,000. The vast majority of its space is devoted to advertisements, but 2 - 3% of each issue contains current events, news and opinion commentary. It is not sold to its readers. The commissioner determined that the "Pennysaver" is not a newspaper under the standards used in *Green v. Home News Publishing Co.,* 90 So. 2d 295, 296 (Fla. 1956). This ruling was rejected by the superior court below.

Inasmuch as *Green* involved review of administrative rules and regulations promulgated under Florida's sale tax law, we are not compelled to follow it. See *McClure Newspapers, Inc. v. Department of Taxes, 132 Vt. 169, 173, 315 A.2d 452, 454 (1974). Where* our statutes do not provide a definition of a word, we look to the plain and commonly accepted use of it. *Brattleboro Chalet Motor Lodge, Inc. v. Thomas,* 129 Vt. 405, 411, 279 A.2d 580, 583 (1971). Furthermore, in construing a statutory word or provision, this Court will avoid a construction which may lead to the unconstitutionality of the provision in question if a reasonable alternative construction exists. Cf. *Audette v. Greer,* 134 Vt. 300, 302, 360 A.2d 66, 68 (1976) (construction leading to irrational consequence or rendering legislation ineffective avoided). Therefore, we decline to adopt a definition of "newspaper" publications based upon their content, see *Erznonik v. City of Jacksonville,* 422 U.S. 205, 215 (1975); *Police Department v. Mosely,* 408 U.S. 92, 95 (1972), as the appellant urges through its endorsement of the commissioner's use of *Green.*

Webster's New International Dictionary (2d ed. unabridged 1955), states that a newspaper is "[a] paper printed and distributed, at stated intervals, usually daily or weekly, to convey

news, advocate opinions, etc., now usually containing also advertisements and other matters of public interest." The "Pennysaver" is printed material distributed at a stated interval that contains matters of public interest. While it may be possible for a newspaper to appear at irregular intervals defined by specific events of interest to readers, we need not reach that issue here, since the "Pennysaver" appears regularly each week. As such, it is clearly not a mere handbill or broadside distributed without any periodicity. Moreover, the publication clearly raises or relies upon the interest of a significant segment of the public, unlike the usual correspondence of a few individuals. Since this printed material is both periodic and of public interest, this court is unwilling to hold that the "Pennysaver" is not a newspaper within the commonly accepted use of that term.[1] The fact that it is not "sold" in the commonly accepted meaning of the term "sale" does not change this result. *L. H. Henry & Sons v. Rhinesmith,* 219 Iowa 1088, 1090-92, 260 N.W. 9, 10-11 (1935).

[1]By 1979, No. 105 (Adj. Sess.) § 40, a definition of "newspaper" requiring at least 10% average content other than advertising was added to 32 V.S.A. § 9741(15). Similarly, the distinction between sale and free distribution was removed, as regards incorporated ingredients. Thus the "Pennysaver" would now qualify for its claimed exemption if, but only if, the content of its printed material met the statutory definition.

Since the superior court was correct in classifying the "Pennysaver" as a newspaper, we turn to the plaintiff's contention that the provisions of 32 V.S.A. §9741 (14) and (15)[2] when read together indicate a legislative intent to wholly exempt the newspaper publication process from the sales and use tax.

In construing a statute, the plain, ordinary meaning of language is presumed to be intended. *In re Middlebury College Sales & Use Tax,* 137 Vt. 28, 31, 400 A.2d 965, 967 (1979); *Standard Register Co. v. Commissioner of Taxes,* 135 Vt. 271, 273, 376 A.2d 41, 43 (1977). The term "sale" is defined in 32 V.S.A. §9701(6) to include "any transfer of title or possession or both . . . for a consideration." See *Standard Register Co., supra,* 135 Vt. at 273, 376 A.2d at 42-43. There can be little doubt that the plain meaning of

[2]Subsection (14) was originally worded as follows:

> Receipts from the following shall be exempt from...the use tax imposed under section 9773 of this title.
>
> * * * *
>
> (14) Tangible personal property which becomes an ingredient or component part of, or is consumed or destroyed or loses its identity in the manufacture of tangible personal property for later sale but does not include fuel and electricity.

Effective July 1, 1974, 1973, No. 270 (Adj. Sess.) § 3, amended this subsection to read as follows:

> (14) Tangible personal property which becomes an ingredient or component part of, or is consumed or destroyed or loses its identity in the manufacture of tangible personal property for sale but does not include fuel and electricity; machinery and equipment for use or consumption directly and exclusively in the manufacture of tangible personal property for sale. For the purposes of this subsection, "manufacture" includes extraction of mineral deposits, the entire printing and book-making process, and the entire publication process.

Subsection (15) was originally worded and remained, until 1979: "Sales of newspapers." See Footnote 1, *supra.*

the language of subsection (14), which refers to the "sale" of products manufactured, is to condition the availability of the exemption, on the ultimate sale of the product made from goods the transfers of which are to be exempted. Cf. *Id.* ("Resale" as used in 32 V.S.A. §9741(16) defined).

There is nothing in the language of subsection (14) to overcome the presumption that its language was used advisedly. *State v. Lynch,* 137 Vt. 607, 611, 409 A.2d 1001, 1004 (1979); *State v. Racine,* 133 Vt. 111, 114, 329 A.2d 651, 654 (1974). Therefore, since the meaning of the subsection is plain, in the context of this case there is no necessity for construction of it with respect to subsection (15), and the trial court was required to follow the statute according to its terms, see *State v. Lynch, supra; Swanton Village v. Town of Highgate,* 131 Vt. 318, 325, 305 A.2d 586, 509 (1973).

This rule is not altered by our opinion in *McClure Newspapers, Inc. v. Department of Taxes,* 132 Vt. 169, 315 A.2d 452 (1974), inasmuch as that case dealt with the construction of a word not statutorily defined. While acknowledging that in *McClure* this Court indicated that subsection (15) "manifests some legislative intent that would be defeated if 32 V.S.A. §9741(14) were to be narrowly construed," Mr. Justice Daley, speaking for the Court, made it clear that the presence of subsection (15) does not conclusively show the legislative intent "that no costs of taxation should be imposed on the newspaper business and passed along to the public." *Id.* at 174, 315 A.2d at 455. Goods used in the publication of this newspaper, which is not shown to be sold except in isolated instances, are not exempt from the use tax by reason of subsections (14) and (15)[3].

The plaintiff contends and prevailed in the superior court below with the proposition that the tax imposed upon it is unconstitutional under the equal protection clause of the Fourteenth Amendment of the United States Constitution. In determining whether

[3]See Footnote 1, *supra,* for changes in present statute.

economic regulation is violative of the equal protection clause, this Court is required to impose only the minimum scrutiny of the so-called "rational basis test." This test, variously articulated in our cases, permits a determination of unconstitutionality only where the relevant law classifies similar persons for different treatment upon wholly arbitrary and capricious grounds. *Pabst v. Commissioner of Taxes,* 136 Vt. 126, 133, 388 A.2d 1181, 1185 (1975); *Andrews v. Lathrop,* 132 Vt. 256, 259, 315 A.2d 860, 862 (1974); *Vermont Motor Inns, Inc. v. Town of Hartford,* 134 Vt. 52, 55, 350 A.2d 369, 371 (1975); *In re Barcomb,* 132 Vt. 255, 232, 315 A.2d 476, 481 (1974). Where the classification rests upon "some reasonable consideration of legislative policy," it will not be found unconstitutional. *Andrews v. Lathrop, supra.*

While the plaintiff urges this Court to consider the classification here as distinguishing newspapers which are sold and those which are not sold, we find such a characterization of the statute to be *unnecessarily particular. Cf. Maxwell v. Bugbee,* 250 U.S. 525, 543 (1919) (classes must not be overly particular in equal protection analysis of estate tax).

"Retail sales within the state are the general subject of the sales tax, unless specifically exempted. And sales from outside the state, at retail, to persons within the state are the subject of the compensating use tax, unless specifically exempted." *Standard Register Co. v. Commissioner of Taxes, supra,* 135 Vt. at 273, 376 A.2d at 43. The provisions of 32 V.S.A. §9741 are "part of the statutory definition of the types of sales and uses of tangible personal property which are to be employed in measuring the excises and of those which are not so to be used." *McClure Newspapers, Inc. v. Department of Taxes, supra,* 132 Vt. at 174, 315 A.2d at 455, (quoting from *Wakefield Ready-Mixed Concrete Co. v. State Tax Commissioner,* 346 Mass. 8, 12, 247 N.E. 2d 869, 871-72 (1969). Subsection (14), the so-called "manufacturer's exemption," is intended to fix the point of excise on the last retail transaction in the production process by exempting prior transactions. See *McClure Newspapers, Inc. v. Department of Taxes, supra,* 132 Vt. at 174-75, 315 A.2d at 455. This provision prevents multiple taxation

during the manufacture and production of goods for their ultimate use. The sale to the ultimate user is used as the measuring point for the imposition of the tax, see 32 V.S.A. §§9771(1), 9773(1), and for the definition of exemptions designed to focus the point of excise on retail sales, see *Standard Register Co. v. Commissioner of Taxes, supra,* 135 Vt. at 273, 376 A.2d at 43 (construing 32 V.S.A. §9741(16)). The use of the words "for sale" and "for later sale" in subsection (14) is clearly rationally related to the purpose of the sales and use tax in focusing the point of excise on retail sales and limiting multiple taxation.

Although it might be argued that the plaintiff sells its products at retail to advertisers, the parties have agreed that the plaintiff does not sell its product. Because of this, the sale to the plaintiff of the ink, newsprint and other goods, the tax on which is in contention here, is an ultimate retail sale. Although this means that the same supplies are not taxed to newspapers which sell copies to their readers, through the operation of subsections (14) and (15), this result is consistent with the rational organization of the sales and use tax scheme. Moreover, the rationality of the result is not vitiated by the fact that sales of newspapers are exempt under subsection (15) which is based on the policy of *de minimis non curat lex.* In keeping with its policy of exempting small sales (*i.e.*, under 14¢, 32 V.S.A.§9772), the Legislature could well have considered the large percentage of retail newspaper sales made not only for small sums, but by minors, acting as "independent merchants." The retail sale is the key to the imposition of the tax.

The judgment of the Bennington Superior Court is vacated. The September 20, 1976 assessment of the Commissioner of Taxes is reinstated. To be certified to the Bennington Superior Court and to the Commissioner of Taxes.

FOR THE COURT:

Franklin S. Billings, Jr., Associate Justice

Exhibit B

ENTRY ORDER

SUPREME COURT DOCKET NO. 172-79

SEPTEMBER TERM, 1980

Hadwen, Inc.

v.

Vermont Department of Taxes

APPEALED FROM:

Bennington Superior Court

DOCKET NO. S15-76Bm

In the above entitled cause the Clerk will enter:

Motion for reargument denied.

BY THE COURT:

Albert W. Barney Chief Justice

Rudolph J. Daley, Associate Justice

Robert W. Larrow, Associate Justice

Franklin S. Billings, Jr., Associate Justice

William C. Hill, Associate Justice

Exhibit C

STATE OF VERMONT
BENNINGTON COUNTY

Hadwen, Inc.
Appellant

v.

Vermont Department of Taxes
Appellee

BENNINGTON SUPERIOR COURT

DOCKET NO. S15-76Bm

This is an appeal pursuant to 32 V.S.A. §9817 from a determination of the Deputy Commissioner of Taxes (hereinafter "Commissioner") which held appellant liable for use tax deficiencies plus interest on printing supplies and materials purchased by appellant without the State of Vermont and used by appellant in printing *The Pennysaver.*

This Court has reviewed the record and the facts as set forth in the Commissioner's determination. Although the determination is divided into separate sections entitled "facts" and "discussion," it appears that these delineations were not adhered to by the Commissioner. Several findings of fact appear for the first time in the "discussion." Accordingly, this Court has considered the determination in its entirety for the purpose of determining what facts were actually found by the Commissioner.

Stated briefly, the facts are as follows: Appellant publishes *The Pennysaver*. This piece, in large part, contains commercial advertising and is distributed free of charge in all but an isolated few instances not at issue here. During the period between August 1972 and December 1974 appellant purchased printing supplies and

materials which were eventually incorportated into its product. These purchases were from out-of-state sources. Pursuant to 32 V.S.A. §9773, appellee assessed a use tax on these purchases which, together with penalty and interest, totaled $7,833.91. Upon appeal, the Commissioner affirmed the assessment but abated the penalty and one-half of the interest.

Appellant raises three issues in this appeal. As quoted from appellant's brief they are as follows:

I.

"1) Is appellant herein exempt from the subject assessment of sales and use tax under 32 V.S.A. §9741(14)?

2) Does imposition of the subject tax in the instant proceeding violate the free press and equal protection clauses of the United States Constitution?

3) Does imposition of interest in the instant proceeding constitute an abuse of discretion?"

Appellant argues here, that its exemption under 32 V.S.A. §9741(14) results from statutory construction of that subsection along with 32 V.S.A. §9741(15). Subsection (14) was originally worded as follows:

"Receipts from the following shall be exempt from...the use tax imposed under Section 9773 of this Title."

"(14) Tangible personal property which becomes an ingredient or component part of, or is consumed or destroyed or loses it identity in the manufacture of tangible personal property for later sale but does not include fuel and electricity."

Effective July 1, 1974, No. 270 of the Acts of 1973 (Adj. Sess.) amended this subsection to read as follows:

"(14) Tangible personal property which becomes an ingredient or component part of, or is consumed or destroyed or loses its identity in the manufacture of tangible personal property for sale but does not include fuel and electricity; machinery and equipment for use or consumption directly and exclusively in the manufacture of tangible personal property for sale. For the purposes of this subsection, 'manufacture' includes extraction of mineral deposits, the entire printing and book-making process, and the entire publication process."

Subsection (15) adds "sales of newspapers" to the list of exemptions.

In short, appellant argues that the proper and intended effect of these subsections, taken together, is to exempt the entire newspaper process from imposition of the sales and use tax. A subsidiary argument, but an argument necessary to bring this case within the scope of the above construction, is appellant's contention that *The Pennysaver* is a newspaper.

This Court rejects this line of argument as contrary to the plain meaning and language of the statute. *In Re Middlebury College Sales and Use Tax,* No. 144-78, filed Feb. 8, 1979, 1979 Vermont Slip Opinions 75,77; *Standard Register Company v. Commissioner of Taxes,* 135 Vt. 271, 273 (1977). Since subsection (14) constitutes an exemption from taxation, it must be strictly construed. "(N)o claim of exemption will be allowed unless shown to be within the necessary scope of the statute." *Rock of Ages Corporation v. Commissioner of Taxes,* 134 Vt. 356, 359 (1975).

The phrase "for later sale" in the original version and "for sale" in the post July, 1974, version of subsection (14), cannot simply be ignored. The term "sale" is defined in 32 V.S.A. §9701(6) to include, "any transfer of title or possession or both...for a consideration." Thus, for example, subsection (14) would exempt purchases of printing supplies and materials which are incorporated into a published piece which is sold. But the facts

here are clear that *The Pennysaver* is not sold. It therefore appears that appellant is not entitled to an exemption under subsection (14).

In *McClure Newspapers, Inc. v. Vermont Department of Lakes,* 132 Vt. 169 (1974), the Vermont Supreme Court was presented with a case wherein the Commissioner sought adoption of a restrictive construction of the word "manufacture" in subsection (14) as it was originally drawn. The case involved a newspaper and the Commissioner sought to exclude from the exemption purchases of materials used prior to the actual printing process. In rejecting this construction, the Court stated:

> "Receipts from the sale of the newpaper, the final product, are exempt under 32 V.S.A. §9741(15). The presence of this subsequent subsection does not conclusively show that the legislature intended that no costs of taxation should be imposed on the newspaper business and passed along to the public, but we do feel it manifests some legislative intent that would be defeated if 32 V.S.A. §9741(14) were to be narrowly construed in this instance."

Id. at p. 175.

Concededly, the above cited passage may lend at least some support to the proposition argued by appellant here. However, in *McClure* the Court was considering a word which was nowhere defined in the statute. *Id.* at 173. Here, the word "sale" is clearly defined. See *Standard Register Co. v. Commissioner of Taxes, supra* (definition of "for resale" as found in subsection (16) given narrow statutory meaning). Furthermore, the Court in the *McClure* case went on to state:

> "(W)e are not adopting a 'but for' test that will allow industry in general to exempt itself from the State's use tax statutes."

McClure, supra, at 175.

Accordingly, since *The Pennysaver* is not sold, this Court agrees

with the determination of the Commissioner to the extent that he has held appellant does not fall within the statutory exemption set out in subsection (14) as it was originally drawn or as it was amended during the relevant period of time.

II.

Appellant has attacked the tax imposed "in the instant proceeding" on consitutional grounds. In particular, appellant points to the equal protection and free speech clauses of the United States Constitution.

At the outset, it is important to note that the law recognizes as a near impossibility, a tax without some discriminatory impact. *Andrews v. Lathrop,* 132 Vt. 256, 259 (1974). Accordingly, when presented with an equal protection argument, a court must of necessity determine whether permissible bounds have been exceeded.

The correct mode of analysis has been variously stated by the Vermont Supreme Court. In *Andrews, supra,* the limits are set as follows:

> "What is required is that the discriminatory classification not be capricious or arbitrary, but rest on some reasonable consideration of legislative policy. Judicial inquiry, therefore, is not directed toward a comparison of legislative purposes, but rather toward the nexus between a classification and such purposes as it may serve."

Id. at 259.

The *Andrews* case dealt with the contention, among others, that the six-year holding period of the land gains tax violated the equal protection clause. In rejecting this contention, the Court followed a three-step process. First, the Court looked to see if the challenging party had shown that a discriminatory classification exists. As to the six-year holding period, the Court was satisfied that, on the face of the statute, differentiation was apparent. Second, the

Court looked to see if some legitimate state purpose was served by the classification. Since no fundamental rights or suspect criteria were involved in that case, the Court presumed that the legislature acted reasonably and with a legitimate purpose in adopting the classification. The Court manifested that presumption, in part, by objectively conceiving of a reasonable purpose for the classification and assigning that purpose to the legislature. Finally, the Court looked to see if there exists a reasonable nexus between the classification and the conceived purpose of the legislature.

In *Vermont Motor Inns, Inc. v. Town of Hartford,* 134 Vt. 52 (1975), the Court stated the general rule of analysis as follows:

> "[The] equal protection [clause] does not require identity of treatment with respect to classification for tax purposes, but only that the classification or distinction rest on a real, unfeigned difference; have some relevance to the legislative purposes; and lead to a difference in treatment which is not so disparate as to be wholly arbitrary."

Id. at 55.

Most recently, the Court in *Pabst v. Commissioner of Taxes,* 136 Vt. 126 (1978), stated the formulation as follows:

> "When a person subject to a statutory classification challenges that classification on equal protection grounds, and where there is no suspect class or fundamental right involved, we must uphold the classification if we find that it serves any of the purposes that are conceivably behind the statute in question, and that are within the powers of the Legislature to pursue."

Id. at 132-133.

Thus, the formulation outlined in the *Andrews* case appears unchanged.

In the present appeal, appellant claims impermissible dis-

criminatory impact based on the following logic. *The Pennysaver* is a newspaper, distributed freely, not sold. Assuming subsection (14) exempts from taxation only purchases of supplies, incorporated into a newspaper which is sold, a classification is created: Items purchased and used in the publication of *The Pennysaver* are taxed whereas similar items purchased and used in the publication of newspapers which are sold are not taxed. This, appellant argues, is arbitrary and unreasonable discrimination which imposes an "unfair financial burden" on appellant (Appellant's Brief at pp. 10-11).

By way of general analysis, while it does not appear from the record that appellant is disadvantaged financially, cf. *Andrews v. Lathrop, supra,* at p. 260, this Court agrees that on the face of subsection (14) a classification exists between those who sell their product and those who give their product away. And, as both parties to this appeal readily admit, it is not difficulty to conceive of the legislative purpose behind creating this classification. Quite simply, that purpose is to avoid possible multiple taxation in the instance of a sale. In the normal case, then, the nexus between this classification and this purpose is clear. Subsection (14) exempts that which will later be taxed, in its final form, to the ultimate consumer.

Appellant, however, argues that this is not a normal case. In particular, appellant points to subsection (15) which, as a separate provision, exempts from taxation the sales of newspapers. Presumably, appellant thus contends that legislative removal of newspapers from the list of items to be ultimately taxed to the public consumer vitiates, at least in part, the presumed legislative purpose in enacting subsection (14). In short, to the extent that the sale-no sale classification of subsection (14) was purposefully created to avoid multiple taxation, it loses its nexus in the instance of newspaper publication where the danger of multiple taxation has been otherwise alleviated. In theory, then, if the above reasoning is accepted, the legislature should either tax all newspaper publishers as ultimate consumers of supplies incorporated into the newspaper or none. Appellant contends that the legislature has al-

ready chosen the latter course. This Court agrees.

Of course, the above argument of appellant assumes that *The Pennysaver* is a newspaper. The Commissioner, however, specifically concluded that the publication is not a newspaper. The word newspaper as defined in Webster's Third International Dictionary was cited by the appellant and the case of *Green v. Home News Publishing Co., 90 So.2d 295 (1956) was cited by the Commissioner. There appears to be no definition of "newspaper" within the statute. While the Court was not presented with copies of The Pennysaver,* the record extensively describes its content.

The process of statutory construction is a question of law. *Andrews v. Lathrop, supra, at 259. It is probably unwise to depend on statutory interpretations of other jurisdictions. McClure Newpapers, Inc. v. Department of Taxes, supra,* at 173.

Upon reviewing the record and the overall wording of the statutes here involved, this Court agrees with appellant, that *The Pennysaver* is a newspaper. The term "newspaper" is defined in *Webster's New Collegiate Dictionary* (1977) as follows: "a paper that is printed and distributed usually daily or weekly and that contains news, articles of opinion, features and advertising." Thus, according to both the dictionary cited above and the dictionary cited in appellant's brief, whether or not a publication is a "newspaper" depends on content and regularity of publication, not on the ratio between advertising and non-advertising space. *The Pennysaver* is published weekly (Hearing Tr. (9) at page 15), and contains the various items cited in the above definition.

Since this Court holds that the imposition of use tax on appellant's purchases of supplies incorporated into its newspaper violates the equal protection clause under the so-called rational basis test, it is unnecessary to consider the more stringent compelling state interest analysis mentioned in appellant's brief.

The determination of the Commissioner is REVERSED since the imposition of use tax in this particular case violates the equal protection clause of the United States Constitution.

Dated at Bennington, Vermont, this 9th day of April, 1979.

John P. Morrissey
Superior Judge

Victor K. Harwood

John DeVito

Exhibit D

STATE OF VERMONT

DEPARTMENT OF TAXES

In Re: Hadwen, Inc.
Vermont Sales and Use Tax
June 1969 - December 1974

DETERMINATION OF APPEAL

This is the determination of the timely appeal by Hadwen, Inc. (Hadwen) from assessments of additional Vermont Sales and Use Tax. A hearing was held before the Deputy Commissioner of Taxes in Montpelier, Vermont on June 23, 1976. The hearing was held and this determination is issued under the provisions of 32 V.S.A. Section 9777. The original assessments appealed were in the following amounts:

Period Covered	Tax	Interest	Penalty	Total
June - Dec. 1969	$ 865.47	$ 572.26	$ 43.27	$ 1,481.00
Jan. - Dec. 1970	1,898.25	1,077.60	94.92	3,070.77
Jan. - Dec. 1971	2,894.74	1,276.51	144.74	4,315.99
Jan. - Dec. 1972	2,910.03	916.23	145.49	3,971.75
Jan. - Dec. 1973	2,986.39	619.65	149.32	3,755.36
Jan. - Dec. 1974	3,846.28	328.08	192.33	4,366.69
	$15,401.16	$4,790.33	$770.07	$20,961.56

Following an informal conference with the taxpayer and his representative certain issues were resolved. The disputed assessments are in the following amounts:

Period Covered	Tax	Interest	Penalty	Total
Aug. - Dec. 1972	$ 663.44	$ 415.99	$ 73.34	$1,152.77
Jan. - Dec. 1973	2,480.72	619.65	149.32	3,249.69
Jan. - Dec. 1974	2,911.04	328.08	192.33	3,431.45
	$6,055.20	$1,363.72	$414.99	$7,833.91

At the hearing before the Deputy Commissioner, Hadwen was represented by legal counsel. A Memorandum of Law and additional documents were submitted to the Department of Taxes under date of July 30, 1976.

FACTS

The Taxpayer, Hadwen, Inc., is a Vermont corporation with facilities in Bennington, Vermont. Hadwen is engaged primarily in the sale of classified and display advertising in the Bennington, Vermont area as well as adjacent areas of Massachusetts and New York. Hadwen belongs to several organizations which claim newspapers among their membership. As part of its operations, Hadwen publishes and distributes weekly a circular known as the "Pennysaver." Each edition of the Pennysaver consists of 32 - 48 pages and is distributed without charge to approximately 32,000 recipients in southern Vermont and adjacent areas of New York and Massachusetts. There are, in addition, approximately 150 paid subscriptions which are mailed to persons outside Hadwen's normal delivery area. Editions of the Pennysaver sent through the United States mail require third class postage. The contents of the Pennysaver consist primarily of commercial advertising. An auditor from the Department of Taxes reviewed each issue for a one-year period and found that the Pennysaver consisted of approximately 93% advertising. In addition to advertising, the publication includes public service information, occasional editorials, a bridge column, a "do-it-yourself" column and an employment wanted column. Testimony was given at the hearing that each of the persons employed in publishing the Pennysaver is also involved in news gathering and photography as part of normal duties. In the course of its operations, Hadwen purchased materials and supplies used in publishing the Pennysaver. The Vermont Department of Taxes assessed a use tax on such supplies and materials, which assessment was appealed by Hadwen.

Hadwen argues that the Department of Taxes had issued no regulations specifically dealing with the taxability of materials and

supplies used in publications such as the Pennysaver. Hadwen argues that the issuance of such regulations is a prerequisite to a determination that such materials and supplies are subject to the taxes imposed under 32 V.S.A. Chapter 233. Hadwen also argues that the Vermont Sales and Use Tax is intended to be imposed on the ultimate consumer of tangible personal property. Under Hadwen's theory the recipients of the Pennysaver are the ultimate consumers. Hadwen also argues that the imposition of a use tax on materials and supplies used in the publication of the Pennysaver results in unreasonable classification resulting in an unconstitutional discrimination because such materials and supplies are exempt from tax when used in publishing a newspaper which is later sold. Finally, Hadwen argues that the imposition of the use tax on materials and supplies used in the publication of the Pennysaver results in an unconstitutional burden on its right to free speech in violation of the First Amendment to the United States Constitution.

ISSUE

Whether Vermont Use Tax was properly assessed on the materials and supplies used by Taxpayer in the publication of the Pennysaver, which is distrubuted free of charge to most of its recipients.

DISCUSSION

There is no doubt that the materials and supplies in question were tangible personal property within the meaning of 32 V.S.A. Section 9701(7). Hadwen purchased such tangible personal property from out-of-state nonregistered vendors and, therefore, is liable for Vermont Use Tax under the provisions of 32 V.S.A. Section 9773(1) unless a proper exemption is available.

Hadwen argues that it is entitled to an exemption under 32 V.S.A. Section 9741(15) because the Pennysaver should be considered a newspaper. Even assuming *arguendo* that the Pennysaver is a newspaper, the exemption provided in 32 V.S.A. Section 9741(15) relates to the sale and use of newspapers and not to the

materials and supplies used or consumed in the publication process. No assessment of Vermont Sales and Use Tax was made on the paid subscriptions to the Pennysaver.

It has not yet been established that the Pennysaver is entitled to be considered a newspaper. The Florida court decision, *Green v. Home News Publishing Co.*, 90 So.2d 295 (Fla, 1956), set forth the generally accepted standards and criteria for determination whether a particular publication is a newspaper.

In the *Green* decision the Florida Supreme Court considered the following factors:

(1) Whether the publication was distributed free of charge to the public; (The Pennysaver, for the most part, is distributed free of charge)

(2) Whether the publication was authorized to carry legal advertising;

(3) Whether the publication contained a masthead setting for the name of the publisher, editor, circulation number, and place of circulation; (The sample editions submitted contained no such masthead)

(4) Whether the publication was required by Federal Postal Regulations to pay second or third class postage (newspapers pay second class postage); (The Pennysaver pays third class postage)

(5) Whether the principal purpose of the publication was the dissemination of news or the advertising of business concerns; (The greater part of each sample edition of the Pennysaver is devoted to advertising)

(6) Whether the publication was simply an advertising "giveaway."

Measured against such criteria and with a view toward the strict

construction required of exemption statutes, I find that the Pennysaver cannot be considered a newspaper.

Hadwen also claims exemption under the provisions of 32 V.S.A. Section 9741(14). That statute provides an exemption from the imposition of Vermont Sales and Use Tax for the purchase and/or use of tangible personal property which becomes an ingredient or component part of or is consumed or destroyed or loses its identity in the manufacture of tangible personal property which property is later sold. As previously noted, the Pennysaver is distributed without charge and, therefore, not sold to all but a few of its recipients.

Free distribution does not fit within the definition of *sale* found in 32 V.S.A. Section 9701(6). Since Hadwen does not sell the Pennysaver, it is not entitled to the exemption found in 32 V.S.A. Section 9741(14).

In response to Hadwen's argument that the Department of Taxes had issued no regulations with respect to publications like the Pennysaver, the issuance of such regulations is not required. The Commissioner is empowered to issue regulations where, in his judgment, the proper interpretation and administration of the law requires such. See 32 V.S.A. Section 9702(a)(1). As applied to the facts of this case, the applicable statutes are clear. In no event, however, is the issuance of regulations a prerequisite to the assessment of a deficiency.

In response to Hadwen's argument that it is not the ultimate consumer of the materials and supplies, it is apparent from the evidence that the materials and supplies taxed were consumed in the publishing process and, accordingly, Hadwen, the publisher, is the ultimate consumer. Hadwen does purchase the materials and supplies and exercises a taxable use within the meaning of the provisions of 32 V.S.A. Section 9701(13). The materials and supplies are not sold for resale within the meaning of 32 V.S.A. Section 9701(5).

Hadwen also argues that to impose the tax on the purchase of

materials and supplies by publishers of papers, such as the Pennysaver, results in an unreasonable classification of such publications as distinguished from newspapers. In view of the fact that the Pennysaver is not sold, whether it is classified as a newspaper or not, is without consequence to the assessment at issue.

Hadwen also argues that to impose the tax on the purchase of materials and supplies by publishers of shoppers results in an unreasonable classification of such publications as compared to newspapers. The classification is not between publishers of shoppers and publishers of newspapers but rather the use to which such tangible personal property is put by the publishers. Newspapers use such materials and supplies in the production of tangible personal property for later sale. Specific exemption is provided for the purchase and use of such materials. No exemption is provided on such materials and supplies which do not become a component or ingredient part of tangible personal property which is not sold. Such classification is a reasonable exercise of legislative authority. See *Andrew et al v. Lathrop,* 132 Vt. 256, 315 A2d 860 (1974).

Hadwen also argues that the imposition of Vermont Sales and Use Tax results in an unconstitutional burden on its right to free speech. Hadwen cites *Sears & Roebuck Co. v. State Tax Commission,* _____Mass._____, _____NE2d. (1976). The *Sears* case is not applicable to the assessment at issue in the instant case. *The Sears* case related solely to the sale of advertising supplements to be included in a newspaper. The assessments against Hadwen relate to materials and supplies which were used in the publication of the Pennysaver. The imposition of Sales and Use Tax on such materials and supplies does not result in an infringement of Hadwen's right to free speech any more than the imposition of Sales and Use Tax on the sale of pens, pencils and paper results in an infringement on the right to free speech.

Hadwen finally argues that the assessment of Vermont Sales and Use Tax six years after the enactment of the statute results in an ex post facto law which is unconstitutional. No ex post facto infirmity exists in a civil statute. See e.g., *Caldor v. Bull*, 3 Dall, 386 at

393 (1798). Nor had Hadwen filed appropriate Vermont Sales and Use Tax reporting forms as would put the Commissioner on notice as required by 32 V.S.A. Section 9815. If Hadwen relied in error on a presumed exemption and did not file returns, it cannot now claim that the Commissioner is estopped from performing his statutory duties.

Since its decision, *McClure Newpapers, Inc. v. Vermont Department of Taxes,* 132 Vt. 169, 315 A2d. 452 (1974), the Vermont Supreme Court has made it clear that statutes of exemption are to be strictly construed against the taxpayer. See, for example, *Pizzagalli Construction Co. v. Vermont Department of Taxes*, 132 Vt. 496, 321 A2d. 437 (1974) and *Rock of Ages Corporation v. Commissioner of Taxes*, handed down June 1, 1976. Hadwen has failed to demonstrate that it clearly fits within any exemption provided in 32 V.S.A. Chapter 233.

Due to the substantive nature of the questions presented, penalty is abated and interest is reduced to one-half of one percent per month.

CONCLUSION

1. The assessment of additional Vermont Sales and Use Tax must stand affirmed.

2. Penalty is abated and interest is reduced to one-half of one percent.

Signed this 20th day of September, 1976 at Montpelier, Vermont.

CHARLES E. GOLDKAMP
Deputy Commissioner and General Counsel

Exhibit E

STATE OF VERMONT
VERMONT SUPREME COURT
Dec 29 9 05 AM '80

Michael Krell,
Clerk

DOCKET No. 172-79

JUNE TERM 1980

HADWEN, INC.

v.

DEPARTMENT OF TAXES

NOTICE OF APPEAL

Notice is herby given that HADWEN, INC., Appellee herein, a Vermont corporation having its principal place of business at Bennington, Vermont, appeals to the United States Supreme Court from the decision and entry order of the Vermont Supreme Court entered in the within cause on September 9, 1980, and from the Order denying the Motion for Re-Argument of Hadwen, Inc. which was entered on September 30, 1980. This appeal is taken pursuant to 28 U.S.C. §1257 (2).

Dated at Bennington, Vermont, this 26th day of December, 1980.

HADWEN, INC.

by CLARK, LILLIE & HOLDEN,
its attorneys

by EUGENE V. CLARK
Clark, Lillie & Holden
204 Union Street
Bennington, Vermont 05201

cc: Edwin L. Hobson, Jr.
Vermont Department of Taxes
John S. Burgess, Esq.

AFFIDAVIT OF SERVICE

I hereby certify that I made service of the within Notice of Appeal by mailing three copies of said notice by depositing the same in a United States Post Office, with first class postage prepaid, addressed to the following counsel of record at the following Post Office addresses on December 26, 1980:

Edwin L. Hobson, Jr., Esq.
Attorney for Vermont Department of Taxes
PO Box 694
Montpelier, Vermont 05602

John S. Burgess, Esq.
Attorney for Amicas Curiae
12 Park Place
Brattleboro, Vermont 05301

Dated at Bennington, Vermont, this 26th day of December, 1980.

Eugene V. Clark, Esq.
Clark, Lillie & Holden
204 Union Street
Bennington, Vermont 05201

Subscribed and sworn to
before me this 26th day of
December, 1980.

Elizabeth Salem
Notary Public
My commission expires 2/10/83

No. 80-1291

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

HADWEN, INC.,

Appellant

v.

VERMONT DEPARTMENT OF TAXES,

Appellee

On Appeal from the Vermont Supreme Court

MOTION TO DISMISS

Paul P. Hanlon
Deputy Commissioner
and General Counsel
Vermont Department of Taxes
P.O. Box 694
Montpelier, Vermont 05602
802 828-2805
Attorney for the Appellee

Table of Contents

Page

Table of Authorities ii

Motion to Dismiss 1

Statement of the Case 1

Argument

No Substantial Question Not Previously Decided By This Court Is Raised By This Appeal 2

Conclusion 5

TABLE OF AUTHORITIES

Cases:	page(s)
Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959)	3
Colgate v. Harvey, 296 U.S. 404 (1935)	5
Kahn v. Shevin, 416 U.S. 351 (1974)	5
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973)	3
Maxwell v. Bugbee, 250 U.S. 525 (1919)	5
McGowan v. Maryland, 366 U.S. 420 (1961)	3
New Orleans v. Dukes, 427 U.S. 297 (1976)	3
Ohio Oil Co. v. Conway, 281 U.S. 146 (1930)	5
Statutes:	
VT. STAT. ANN. tit. 32, §9741(14)	1, 2
VT. STAT. ANN. tit. 32, §9741(15)	2
VT. STAT. ANN. tit. 32, §9771(1)	2
1969 Vt. Acts, No. 144, §1	2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1291

HADWEN, INC.,

Appellant

v.

VERMONT DEPARTMENT OF TAXES,

Appellee

On Appeal from the Vermont Supreme Court

MOTION TO DISMISS

The Appellee moves the Court to dismiss the appeal herein on the ground that the question presented is not substantial enough to warrant further argument.

STATEMENT OF THE CASE

This appeal concerns a decision of the Vermont Supreme Court upholding the constitutionality of an exemption from Vermont's sales and use tax. VT. STAT. ANN. tit. 32, §9741(14) exempts sales of materials which become part of manufactured property or which are consumed in the manufacturing process. Such materials are exempt from tax only if they are to be used in the manufacture of goods "for sale".[1]

[1] In relevant portion, the statute exempts sales of:

> (14) Tangible personal property which becomes an ingredient or component part of, or is consumed or destroyed or loses its identity in the manufacture of tangible personal property *for sale* . . . .

VT. STAT. ANN. tit. 32, §9741(14) (emphasis added).

The Appellant prints an advertising circular called the Pennysaver which it distributes free of charge. Because the Appellant concededly makes no sale of the Pennysaver, its purchases of materials and supplies to print the Pennysaver do not qualify for the manufacturing exemption. Unless exempt, Appellant's purchases of printing supplies and materials are taxable as retail sales under VT. STAT. ANN. tit. 32, §9771(1).

Although barred from the manufacturing exemption by its terms, the Appellant claims exemption from the tax on an equal protection theory, comparing itself to newspaper publishers who sell their newspapers to the public and receive the exemption on the purchase of their printing materials and supplies.[2] The Appellant points to an exemption for the sale of newspapers[3] to complete its equal protection argument, asking the Court to find that the rationale behind the manufacturing exemption has no legitimate purpose when applied to newspaper publishers because of this separate exemption for the sale of their product.

ARGUMENT

No Substantial Question Not Previously Decided By This Court Is Raised By This Appeal.

The statutory classification

The manufacturing exemption, VT. STAT. ANN. tit. 32, §9741(14), creates a distinction between those who manufacture their products for sale and those who manufacture products for their own use or for distribution without sale. The exemption is challenged in this appeal because of the requirement that the manufactured goods be sold, and it is this requirement alone

---

[2] While characterization of the Pennysaver as a "newspaper" is essential to this comparison, no First Amendment issue has been raised in this appeal.

[3] At the time of the assessment, the exemption referred only to sales of newspapers. 1969 Vt. Acts, No. 144, §1. The current statute exempts both sales of newspapers and sales of materials and supplies incorporated into a newspaper (whether sold or distributed without charge), but only if the publication contains at least ten percent news of general or community interest. VT. STAT. ANN. tit. 32, §9741(15).

which must withstand equal protection scrutiny. The statute does not, on its face, classify "newspapers" in any way, and newspaper publishers are treated no differently from other manufacturers. Treatment among manufacturers differs only to the extent that the manufactured goods are sold or not sold.

The equal protection test

Where, as here, the challenged statute creates a classification which calls into question no fundamental constitutional guarantee other than equal protection, the Constitution requires only "that the classification challenged be rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). State statutes are afforded a presumption of constitutionality, *McGowan v. Maryland*, 366 U.S. 420, 425 (1961), and where the states' ability to enact revenue measures is involved, the Court has allowed the states "very wide discretion" in developing laws with the "flexibility and variety that are appropriate to reasonable schemes of state taxation." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959).

Application of the test

The manufacturing exemption promotes the overall purpose of the Vermont sales and use tax, which is to levy the tax on the final user of a product. The purpose is served by the exemption in two ways: where the materials purchased by a manufacturer are incorporated into a product which is then sold, no tax is collected at this intermediate level; and where the materials go into a product which is not sold, but used by the manufacturer (or distributed without charge), the tax is payable because the manufacturer is the final user. The Vermont Supreme Court recognized this purpose in its opinion in this case when it stated:

> Subsection (14), the so-called "manufacturer's exemption," is intended to fix the point of excise on the last retail transaction in the production process by exempting prior transactions.

Appellant's Jurisdictional Statement at 7a. The "for sale" require-

ment of the exemption thus has a rational relationship to the legitimate state interest of generating revenues from an excise on the final user of a product.

The Appellant, however, argues that the interest of the state in exempting a manufacturer's materials is no longer supportable where the final sale of the manufacturer's product is not taxed. If such an argument were accepted, the outcome would not be extension of the exemption to the Appellant, as it requests, but denial of the exemption to manufacturers whenever a sale to the final user of the manufacturer's product is not taxed.

But qualification for the exemption cannot depend upon the actual taxation of the product upon its final sale, because such a test would be impossible to administer. At the time raw materials are purchased by the manufacturer, it is impossible to know whether the final sale will be taxable as a retail sale in Vermont, exempt under a specific relief provision, or excluded from the tax by virtue of an out-of-state sale. The purpose of the exemption is to shift the focus of the tax consequences to the final transaction, whether those consequences be taxation or exemption, not to insist that the final transaction be taxed.

Although the state has demonstrated a legitimate purpose behind the classification contained in the manufacturing exemption, the Appellant asks that the statute be tested in a specific factual setting. Since newspaper publishers who sell their newspapers are exempt from taxation on the materials incorporated into their product, and their newspapers are also exempt when sold, the Appellant reasons that the legislature must have intended to benefit the newspaper industry as a whole. Therefore, the reasoning continues, the Appellant must also be exempt, or the two exemptions, read together, are unconstitutional.

Such an analysis fails for two reasons. First, as a matter of legislative intent, the Vermont Supreme Court concluded that there was no necessity to construe the two exemptions together. Appellant's Jurisdictional Statement at 6a. The Court's conclusion was based on findings that the two exemptions served different purposes, each valid and rational. The manufacturing exemption fixes the point of excise on the last retail transaction by exempting intermediate transactions, and the newspaper exemption allows small sales (often by "minors, acting as 'independent merchants' ") to be exempt. Appellant's Jurisdictional Statement

at 8a.

The Appellant's analysis must also fail because decisions of this Court establish that judgment of a classification by its result in a particular instance is neither necessary nor desirable:

> The question of equal protection must be decided in respect of the general classification rather than by the chance incidence of the tax in particular instances or with respect to particular taxpayers. "And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law." *Maxwell v. Bugbee*, 250 U.S. 525, 543.

Colgate v. Harvey, 296 U.S. 404, 436 (1935). The Court has consistently refused to look behind a statutory classification in search of an impermissible category because to do so would subject state legislatures to an "intolerable supervision" by the Court of their attempts to achieve rational economic structures for their states. *Kahn v. Shevin*, 416 U.S. 351, 356 (1974); *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930).

The categories created by Vermont's manufacturing exemption did not result from hostile discrimination, but were developed as part of a rational taxing plan. No further supervision need be undertaken by this Court.

CONCLUSION

Wherefore, Appellee respectfully submits that no substantial question not previously decided by this Court is raised by this appeal, and Appellee respectfully moves the Court to dismiss this appeal.

Dated at Montpelier, Vermont this 20th day of April, 1981.

Respectfully submitted,

Paul P. Hanlon
Attorney for Appellee

Certificate of Service

I hereby certify that on this 20th day of April, 1980, three copies of this motion to dismiss were mailed, with first class postage prepaid, to Eugene V. Clark, Esq., Clark, Lillie and Holden, 204 Union Street, Bennington, Vermont 05201, Counsel for the Appellant. I further certify that all parties required to be served have been served.

Paul P. Hanlon
Deputy Commissioner and
General Counsel
Vermont Department of Taxes
P.O. Box 694
Montpelier, Vermont 05602
Attorney for Appellee